(17) (16)

Nos. 94-923 and 94-924

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RUTH O. SHAW, *et al.*,
Plaintiff-Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

JAMES ARTHUR POPE, *et al.*,
Plaintiff-Intervenors Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

On Appeal From The United States District Court
For The Eastern District of North Carolina

REPLY BRIEF OF APPELLANTS SHAW, *ET AL.*,

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REPLY BRIEF OF APPELLANTS SHAW *ET AL*

Once again this Court has before it the "bizarre" North Carolina redistricting plan that gave rise to the decision in *Shaw v Reno*, 113 S.Ct. 2816 (1993), and its recognition of a claim "'analytically distinct' from a vote dilution claim." See *Miller v Johnson*, 115 S.Ct. 2475, 2485 (1995). Innumerable efforts have been made to obscure *Shaw's* message that racial distinctions, whether overt or concealed, are "by their very nature odious to a free people," *Hirabayashi v United States*, 320 U.S. 81, 100 (1943), and therefore are subject to "strict scrutiny." *Richmond v J. A. Croson*, 488 U.S. 469 (1989). These efforts -- which have included ridicule,[1] conjuring up retrospectively a nonexistent legislative intent,[2] using

[1] Some critics have portrayed *Shaw* as being concerned with "aesthetics." See, e.g., State Br. 47, which quotes the reference in *Shaw v Hunt*, 861 F.Supp. 408, 454 (E.D.N.C. 1994) to "districts whose lines are sufficiently 'regular' or 'pleasing' in their appearance to satisfy the aesthetic sensibilities of a handful of unelected federal judges." This criticism misses the point that in congressional redistricting, "appearances do matter," *Shaw* at 2827, because shape "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 115 S.Ct. at 2486. Moreover, as pointed out before (Shaw Br. 20-22), the "appearances" also emphasize the racially polarizing message of the gerrymander and reveal the lack of "narrow tailoring."

[2] In line with the conclusion reached by the majority in the court below, Appellees attribute the redistricting plan enacted by Chapter 7 on January 24, 1992 to the General Assembly's "reevaluation" of the legality of the original plan enacted a half year earlier. See State Br. 11-13. Yet the legislative history of Chapter 7

purported "experts" to rationalize that bogus intent post hoc,[3] distorting the meaning of words,[4] omitting significant

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makes clear that any "reevaluation" related not to the legality of the original plan but instead to the inability to obtain preclearance and to the possibility for Democrats to create two majority-black districts, and elect two black Representatives as mandated by the Civil Rights Division, without injuring Democratic incumbents.

[3] Appellees, like the majority in the court below, rationalize the distorted boundaries of each of the two majority-black districts as a recognition by the General Assembly of the community of interest among the persons placed in each district. However, until January 1993, the General Assembly did not have available the socioeconomic information now being used to justify the district boundaries, which a computer operator formed by manipulating the 229,000 census blocks into which North Carolina is divided. In *Hays v Louisiana*, 839 F.Supp. 1996 (W.D. La. 1993), vacated, 114 S.Ct. 2731 (1994), the three-judge district court strongly criticized both the methodology and the "expert" later relied on by the State Appellees in *Shaw v Hunt*.

[4] For example, Appellees and their Amici have insisted that, instead of being a version of "apartheid," the two majority-black districts in North Carolina are among the most "racially integrated" in the country. See, e.g., ACLU Br. 17. Their premise is that when the number of blacks who reside in a district is the same as the number of whites, "integration" has been attained. Obviously this premise is wrong because it ignores where persons of the different races are located within the district. If all blacks live in one half of a district and all whites live in the other half, that district is not "integrated." Similarly, the two North Carolina majority-black districts, which were formed by connecting concentrations of blacks with "white corridors," are "segregated" -- not "integrated." The Amicus Brief for the United States also obscures the issues before this Court by using throughout the term "black opportunity district" instead of the previously-used and more accurate terms "majority-black district" and "majority-minority district." See also 861 F.Supp. at 417, n. 3.

language from quotations,[5] and employing personal invective[6] -- now culminate in the briefs of the Appellees and their Amici in this Court. Despite this onslaught by those who disparage the ideal of a "color-blind society" as being unrealistic and attack those who object to the use of race to allocate political office, this Court must not retreat

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[5] A comparison of language in the State Appellees' Brief at 31 concerning testimony by Congressman Watt with the transcript of that testimony (JA 511-12) reveals such an omission, which has the effect of changing the meaning. The transcript makes clear that, as stated in Shaw Appellants' Brief at 44, n. 42 and in Chief Judge Voorhees' dissent (861 F.Supp. 478, n. 5), Congressman Watt stated in a videotaped panel that he preferred not "having to cater to the business *or white* community" (emphasis added). Similarly, the briefs of the State Appellees at 32 and the Gingles Appellees at 15, contain parallel quotations concerning "traditional race-neutral districting principles;" but each brief omits from the quotation the words "including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests." See 115 S.Ct. at 2488. By this omission Appellees obviously were seeking to minimize the importance of "traditional principles" like "geographic compactness" -- a principle specifically relied on in *Gingles* and in *Shaw* -- and were attempting subtly to substitute amorphous concepts like "functional compactness" and "homogeneity." Similarly, in both briefs, the immediately preceding sentence omits from quoted language of this Court its reference to a "district's shape and demographics" as "circumstantial evidence" of legislative purpose. This omission is a parallel effort by Appellees to obscure *Shaw's* teaching that their "bizarre" shapes demonstrate that race was the predominant factor in the creation of Districts One and Twelve.

[6] Appellants submit that the Gingles Appellees' Brief at 12-13, contains a clear accusation that Appellants Shaw and Shimm -- who reside in the Twelfth District -- are white racists. This ad hominem attack on Appellants is a time-honored but deplorable tactic, which only obscures constitutional issues.

from the principled position it took in *Shaw*. Instead it should reemphasize the basic principles of race neutrality implicit in the Fourteenth and Fifteenth Amendments.

I. Appellants Have Standing

In the wake of *United States v Hays*, 115 S.Ct. 2431 (1995), Appellees contest Appellants' standing to assert their constitutional claims. See State Br. 30; Gingles Br. 8. In so doing, Appellees reveal their misunderstanding of *Shaw*, for the gist of a *Shaw* claim is that a registered voter has a right to be free from race-based redistricting. As both *Hays*[7] and *Miller*[8] make clear, *any* registered voter who resides in a racially gerrymandered district has standing to complain of the constitutional injury which results from being placed in a district whose boundaries have been drawn on the basis of race. The "expressive harm" caused by racial gerrymandering is similar to that which results from other race-based classifications.[9]

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[7] "Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's actions[.]" 115 S.Ct. at 2436.

[8] "As residents of the challenged Eleventh District, all Appellees had standing." 115 S.Ct. at 2485, citing *Hays*.

[9] Thus, under the Equal Protection Clause, "the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks..., buses..., golf courses..., beaches... and schools." See *Miller*, 115 S.Ct. at 2486 and cases cited there. It makes no difference that the segregated parks, buses, golf courses, beaches, and schools are "equal" so long as they are "separate." Identification of candidates by race also violates equal protection because it induces race-based voting. *Anderson v Martin*, 375 U.S. 399 (1964).

Appellants Shaw and Shimm are "white filler people"[10] in a corridor which connects concentrations of blacks so that the boundaries of the Twelfth District will include more than a majority of registered black voters. However, as this Court made clear in *Shaw*, Appellants' race is irrelevant to their standing to challenge racial gerrymandering.[11] Furthermore, the automatic standing of Appellants Shaw and Shimm under *Hays* and *Miller* makes equally irrelevant whether their Congressman -- Melvin Watt -- is representing them effectively.[12] They are not required to establish that their representative in the Congress has "voted wrong" or neglected his duties; it is the unconstitutional race-based process by which the representative was selected that gives rise to their

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[10] This term refers to white voters in majority-black districts, who "should not be expected to compete in any genuine sense for electoral representation" in those districts, "lest they undo the preference given to the specified minority group." See T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v Reno, 92 Mich.L.Rev. 588, 630-31 (1993).

[11] Cf. *Powers v Ohio*, 499 U.S. 400 (1991) (defendant may object to race-based exclusion of jurors through peremptory challenges whether or not defendant and excluded jurors share same race); *J.E.B. v Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1421 (1994) (litigants and potential jurors have right to jury selection procedures "free from state-sponsored group stereotypes rooted in and reflective of historical prejudices").

[12] It seems clear, however, that a racial gerrymander sends a message to elected officials, "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." See *Miller* 115 S.Ct. 2436, quoting *Shaw*. The testimony of Congressman Watt, previously cited in this brief at n. 5, makes clear that he was quite predisposed to this message.

standing.[13] Likewise, a registered voter's standing does not require evidence that the voter actively opposed the Representative who was elected by an unconstitutional process.[14] Of course, the assertion in Gingles Appellees' Brief at 12-13 that Appellants Shaw and Shimm simply object to being represented in Congress by an African American confuses with bias Appellants' concern for constitutional principles.[15]

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[13] In addition to their "stigmatic injury," Appellants Shaw and Shimm were harmed by being placed in a "dysfunctional" district which is the least geographically compact in the United States. See Shaw Br. 35-39. This harm also confers standing because no nexus is required "between the injury [Appellants] claim and the constitutional rights being asserted." *Duke Power Co. v Carolina Environmental Study Group.*, 438 U.S. 59, 73 (1978); *Northeastern Florida Contractors v Jacksonville,* 113 S.Ct. 2297 (1993).

[14] Gingles Appellees' Brief at 11 notes that "Plaintiffs" had "actually voted for" Congressman Watt. It is unclear who is embraced within the term "Plaintiffs." Admittedly -- in response to a question that he termed "unprincipled," cf. *Rodgers v Lodge*, 458 U.S. 613, 647 n. 30 (1982) (Stevens, J., dissenting) -- Appellant Shimm acknowledged that in the general election he had voted for Watt. However, a voter whose choices are limited by racial gerrymandering does not waive his right to equal protection by making one of the limited choices available, rather than failing completely to exercise the most precious right of citizenship.

[15] The depositions Appellees took of Shaw and Shimm make clear that they have never hesitated to vote for African Americans or to cooperate interracially in political activities. See Shaw Br. 45, n. 44. Therefore, it is especially ironic that they are represented in Congress by an African American who has expressed publicly his satisfaction that he need not "cater to" the "white community" and who has stated on national television and elsewhere that he believes the majority opinion in *Shaw* was based on "racist assumptions." JA 509.

Appellees also insist that Appellants Shaw and Shimm only have standing to attack the Twelfth District, in which they were placed by the racial gerrymander. However, as the record clearly reveals, the racial gerrymandering required to create the majority-black Twelfth District had an inevitable "ripple effect" on the boundaries of the First District and other districts;[16] and therefore the Appellants Shaw and Shimm had standing to challenge not only the Twelfth District, where they were registered to vote, but also all the districts subject to the "ripple effect."[17] Due to the "ripple effect" of creating the majority-black Twelfth District, the other three Durham Plaintiffs -- the Everetts and Bullock -- also had standing to challenge not only that district but also the other districts. Ironically, Appellees' implausible explanation for the boundaries of the two majority-black districts confirms the standing of these Plaintiffs.[18]

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[16] The extent of the "ripple effect" -- a term employed by State Appellees' Brief at 5 -- is demonstrated by the circumstance that in the North Carolina General Statutes, §163-201, the first redistricting plan covered six pages (173-179); but the later plan covers 37 pages (141-178 in Supplement to §163-201).

[17] The creation of the two majority-black districts also had a "profound reciprocal effect on the racial composition of" the ten other districts and made them more predominantly white. Cf. *Keyes v School District*, 413 U.S. 189, 201-02 (1973). This "reciprocal effect" requires examination of the entire redistricting plan in order to determine whether racial gerrymandering has occurred and, if so, to perform the necessary "strict scrutiny." Therefore, no basis exists to preclude Appellants from attacking all the districts affected by the creation of the First and Twelfth Districts.

[18] The Chapter 601 plan placed all of Durham County in the First and Second Districts, both of which districts were predominantly "rural" -- at least as Appellees now use this term. However, the

As reflected in the "bizarre" appearance of the North Carolina plan, the creation of the two majority-black districts had a "profound reciprocal effect" on the boundaries and racial composition of the other ten districts. Under these circumstances, Appellants submit that the court below did not violate *Hays* in holding that all registered voters, white or black, who reside in North Carolina have standing to challenge the racial gerrymander.[19] In any event, since Appellants Shaw and Shimm have standing, this Court "need not consider whether the other individual . . . plaintiffs [or the plaintiff-intervenors] have standing to maintain the suit."[20]

Chapter 7 plan linked Durham blacks with concentrations of blacks in Charlotte and Gastonia some 150 miles away, because of an alleged State interest in having a majority-black "urban" district. In explaining this "interest," State Appellees' Brief at 23 refers to the testimony of Representative Toby Fitch, a co-chair of the House Redistricting Committee, that "There's a difference between a black in Durham and a black in Warren County or a black in Wilson County." See JA 411-12. In testimony suffused with racial stereotypes, Fitch, an African-American attorney, explained: "In other words, those who wore suits and didn't work in the field, as such, could be with those who wore suits and those who wore bib overalls could kind of be together with us who wore bib overalls." If this post hoc rationalization were accepted, the corollary would be that, unlike its concern with creating an "urban" district for blacks, the General Assembly had no concern about placing "urban" whites in Durham County -- like Appellants Everett and Bullock -- with the "rural" whites in "coveralls" in the rest of the Second District.

[19] See 861 F.Supp. at 425.

[20] *Arlington Heights v Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264, n. 9 (1977). From the filing of their complaint, Appellants have attacked the entire redistricting plan; but any significant reconfiguration of either majority-black district would inevitably require redrawing the boundaries of most, if not all, other

II. The Lower Court's Finding of a Racial Gerrymander Was Correct by any Standard

Plaintiffs proved -- and the district court found unanimously[21] -- that the redistricting plan was a racial gerrymander. Indeed, the plan "is so bizarre on its face that it is 'unexplainable on grounds other than race,'" *Shaw*, 113 S.Ct. at 2825 (citing *Arlington Heights*);[22] and racial data were the only socioeconomic information in the computer used to draw the plan. Moreover, the race-based purpose is highlighted by the sequence of events[23] -- the December 17, 1991 meeting with Assistant Attorney General John Dunne in Washington,[24] the preclearance letter the next day,[25] the subsequent legislative history,[26]

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districts in the State.

[21] See Finding 1 and Conclusion 4 at 861 F.Supp. 473. Indeed the court concluded that the State Defendants essentially had conceded the issue. *Ibid.*

[22] Consistent with *Miller's* discussion of the relevance of "shape" as "persuasive circumstantial evidence," 115 S.Ct. at 2486, a comparison of maps of district boundaries for the First and Twelfth District with maps showing "racial and population densities" makes clear "the story of racial gerrymandering." *Id.* at 2489; see maps 8, 10-15 in Exhibit 301.

[23] "The specific sequence of events leading up to the challenged decision also may shed light on the decisionmaker's purpose." *Arlington Heights*, 429 U.S. at 267 (1977).

[24] See Senator Winner's testimony, JA 696-98, 701.

[25] Gerry F. Cohen, the person who actually drew the North Carolina plan, testified specifically that after receipt of the letter denying preclearance, his interpretation was "that the Justice Department would not grant preclearance unless two majority

and the letter by which the General Assembly solicited preclearance of the Chapter 7 plan.[27] The State's defense that it had a "compelling interest" in compliance with § 5 equates to an assertion of its race-based purpose of creating two majority-black districts. Carrying out this legislative purpose had an obvious and inevitable "reciprocal effect on the racial composition of" the other districts. In short, as demonstrated by the legislative record and by overwhelming circumstantial evidence, the dominant intent of the General Assembly in enacting Chapter 7 was to establish "quotas" of two black and ten white representatives from North Carolina.[28]

Appellees maintain, however, that the lower court failed to find a "predominant" race-based motive, and that

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minority districts were created." JA 675. See also Cohen's testimony that "the principal reason for" the configuration of the First District "was to create one of two majority minority districts in North Carolina." *Ibid.*

[26] In remarks on the Senate floor, Dennis Winner, Senate Redistricting Committee Chair, made clear Chapter 7's predominant race-based purpose shortly before its enactment. JA 196-205.

[27] North Carolina's letter to the Department of Justice asserts that the "**overriding purpose** was to comply with the dictates of the Attorney General's December 18, 1991 letter and **to create two congressional districts with effective black voting majorities.**" JA 162 (emphasis added).

[28] To the extent the plan protected incumbents, as Appellees now contend, the protection was of "white incumbents" and was consistent with the "quotas." Of course, the protection of "white incumbents" was a reason stated by Assistant Attorney General John Dunne for denying preclearance of the first plan. JA 153.

this was required by *Miller*.[29] However, the lower court's findings, when considered in the aggregate, make clear that, as in *Miller*, the state's "dominant concern" was "[b]eyond any question" to create a prescribed number of majority-black districts.[30] Moreover, even if, in redistricting, the General Assembly used race occasionally as a proxy for political affiliation, this would not prevent race from being the "predominant motive" for North Carolina's gerrymander. Indeed, as *Powers* held in a parallel context, such use of race as a "proxy" is impermissible because it "accept[s] as a defense to racial discrimination the very stereotype the law condemns." 499 U.S. at 410.

III. The State Lacked Any Compelling Interest In Creating The Racial Gerrymander

When this case was originally before the court in April 1993, no defense was offered that the State had enacted the redistricting plan in order to remedy past racial discrimination. The only justification was a purported intent of the General Assembly to comply with

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[29] As Appellants have pointed out in their Brief on the Merits at 19, n. 16, the usual requirement for invoking "strict scrutiny" of a racial classification is the presence of a race-based motive without which the plan would not have been adopted. Thus, in *Hunter v Underwood*, 471 U.S. 222 (1985), this Court gave no indication that the race-based purpose must be "predominant" in order to permit an equal protection attack on voting requirements. To impose any additional requirement would lead to confusion, attempts at evasion, and the "inconsistency" deplored in *Adarand Constructors, Inc. v Pena*, 115 S.Ct. 2097, 2111 (1995).

[30] For example, the district court found that "the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority." See 861 F.Supp. at 431.

the Voting Rights Act. Indeed, as noted in the Shaw Appellants' Brief on the Merits at 4 and 27, the oral argument for the State Appellees focused almost exclusively on compliance with § 5 of the Voting Rights Act. On remand, new defenses were asserted.

One such defense was that the State had adopted the second redistricting plan to remedy the effects of racial discrimination. However, the district court found that any "sentiment" in the General Assembly for eradicating effects of past or present discrimination in North Carolina's political processes "was not sufficient in voting power to have caused the legislative action independent of the perceived compulsion of the Voting Rights Act." See 861 F.Supp. at 473, Finding 3. This finding makes irrelevant the generalized racial discrimination on which Appellees rely in seeking to establish a "compelling interest."[31]

Miller has demolished the State's primary defense -- compliance with § 5 of the Voting Rights Act. State Appellees' Brief at 40 feebly attempts to distinguish *Miller* on the ground that -- unlike Georgia -- the "maximization policy" of the Civil Rights Division "was not at work in North Carolina." However, in light of the facts of this case and the judicial findings in the Georgia and

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[31] This Court has demonstrated justifiable unwillingness to sustain racial classifications because of "societal" discrimination. "Societal discrimination, without more, is too amorphous a basis for imposing a racially-classified remedy." *Wygant v Jackson Board of Education*, 476 U.S. 267, 276 (1986). Cf. *Richmond v J. A. Croson, supra; Adarand, supra; Freeman v Pitts*, 503 U.S. 467 (1992); *Missouri v Jenkins*, 115 S.Ct. 2038 (1995).

Louisiana redistricting cases,[32] the Court would be blind to reality if it failed to recognize that, as in Georgia, the denial of preclearance in North Carolina resulted from the same policy of the Department of Justice.[33] In any event, the General Assembly believed, with good reason, that the Department of Justice would continue to deny preclearance until two majority-black districts were created. Under *Miller*, a belief -- mistaken or otherwise -- that obtaining preclearance requires a racial gerrymander cannot give rise to a "compelling interest."

Appellees also claim that the second redistricting plan was justified by a "compelling interest" in complying with § 2 of the Voting Rights Act and that the General Assembly came to perceive this interest because denial of preclearance led to a "reevaluation" of the State's liability to a successful § 2 action. This contention is contrary to the legislative record, which makes clear that for most legislators the sole concern was with obtaining preclearance.[34] Also, it implies that the General Assembly acted in bad faith when it sought to justify the original redistricting plan, which had a single majority-black district. Cf. *Miller*, 115 S.Ct. at 2489-90. Furthermore, if a "reevaluation" occurred -- as the State Appellees now claim -- the stimulus was the administrative denial of preclearance without a hearing and incident to the

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[32] *Hays v Louisiana*, 839 F.Supp. 1996, n. 21 (W.D.La. 1993), vacated, 114 S.Ct. 2731 (1994); *Miller*, 115 at 2491.

[33] In the letter denying preclearance of the first redistricting plan, the discussion of the feasibility of a "second majority-minority congressional district" reflects the "max-black" policy. JA 152-3.

[34] See, e.g., testimony of Senator Dennis Winner, Chair of the Senate Redistricting Committee, JA 702-03.

apparent effort by the Civil Rights Division to enforce its illegal "max-black" policy. Under these circumstances, any "reevaluation" by the General Assembly was tainted by the illegal "maximization policy" -- which *Miller* condemned -- and should be disregarded.[35]

If the General Assembly had concluded that the State was susceptible to a successful § 2 suit, this conclusion would have had no "strong basis of evidence." No suit could succeed without fulfilling the conditions set forth in *Thornburg v Gingles*, 478 U.S. 30, 50-51 (1986).[36] Thus, for the General Assembly to conclude that a racial gerrymander would be necessary to prevent liability under § 2, the legislators would have had to believe that imaginary plaintiffs challenging the first plan could establish by a preponderance of the evidence that the *Gingles* conditions were satisfied in North Carolina --

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[35] The argument has also been made that denial of preclearance of the first plan was equivalent to a finding that the State had purposefully violated § 2. In view of the lawless enforcement of § 5 by the Civil Rights Division, to accept this argument would lead to a result in conflict with *Miller's* holding that a State has no "compelling interest in complying with whatever preclearance mandates the Justice Department issues." 115 S.Ct. at 2491. In considering the effect of the denial of preclearance, the majority in the district court only required that the General Assembly "reasonably conclude" that the Justice Department's interpretation and enforcement of the Voting Rights Act be "legally and factually supportable." This falls short of *Miller's* requirement that a state must show that its race-based decisionmaking was "reasonably necessary under a constitutional reading and application of" federal voting rights legislation. *Ibid.*

[36] *Growe v Emison*, 113 S.Ct. 1075 (1993). Satisfying these conditions is necessary, but not always sufficient, for establishing a § 2 violation. *Johnson v DeGrandy*, 114 S.Ct. 2647 (1994).

namely, that (1) the black population is "sufficiently large and geographically compact to constitute a majority" in two single-member districts, (2) they are politically cohesive, and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate in districts that are not majority minority." *Ibid.* Because African Americans constitute only 20% of North Carolina's voting age population, are widely dispersed, and are not a majority in any large-sized county, simple mathematics suggests that the *Gingles* requirement of geographical compactness cannot be met for two districts.[37] However, the majority in the court below stated: "The overwhelming evidence established that the State's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts; numerous examples of plans drawing two majority-minority districts were presented to the court . . . including several prepared by the Plaintiff-Intervenors in which the majority-minority districts themselves were 'geographically compact' under any reading of *Gingles*." 861 F.Supp. at 463-65. In support of this proposition, a total of eleven plans are cited. 861 F.Supp. at 462-65. As this Court can readily determine from visual examination of these plans, which are in the record and have been lodged with the Court, *none* of these plans conforms to the assertion by the majority in the district court.[38] Thus, contrary to the "clearly

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[37] To fulfill the requirement would necessitate creating two compact districts with at least 276,194 African Americans in each.

[38] Eight of these plans have majority-black districts which are merely variations of the current Twelfth District -- the "least geographically compact" congressional district in the country. Another has a non-compact majority-black district which runs along the Virginia border. The final two plans cited by the majority below

erroneous" finding of the court below, it is clear that no plan exists or can be produced which would satisfy the first *Gingles* condition of a black population sufficiently "geographically compact" to constitute a majority in two congressional districts.[39] Since Appellees had the "burden of producing" a map which would show that it is possible to draw two geographically compact majority-black districts,[40] Appellees can gain no support from § 2 until

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were created by Dr. Hofeller, the expert for Plaintiff-Intervenors; and in each, there is only one majority-black district and another district in which blacks are less than 42% of the voting age population. Thus, as revealed by the tables that accompany each plan, these two plans would create *only one* majority-black district. The majority below specifies that "majority-minority district" means majority-black, 861 F.Supp. 417, n. 3; and so, it could not have considered a plurality-black district to be a "majority-minority district." On the important constitutional issues of this case, the Court should disregard lower court findings so "clearly erroneous" that it is incomprehensible why they were made.

[39] Redistricting plans probably can be drawn that contain two majority-black districts more geographically compact than the "bizarre" First and the Twelfth Districts. This does not satisfy the first *Gingles* condition; but it shows the absence of "narrow tailoring."

[40] Even Appellees do not dispute that they bear the "burden of production" as to "compelling interest" and "narrow tailoring." State Br. 38. Citing statements in *Wygant*, they contend, however, that the burden of persuasion on these issues remains on Plaintiffs. Appellants submit that *Wygant* did not address the distinction between "burden of production" and "burden of persuasion." Because racial gerrymanders are "constitutional crimes," this analogy seems appropriate: In a criminal case, the prosecution always has the burden of proving guilt beyond reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); but nevertheless, as to various defenses, the burden of persuasion often rests on the defendant. *Martin v Ohio*, 480 U.S. 228 (1987); *Patterson v New York*, 432 U.S. 197 (1977). See also James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw

that burden has been carried.[41]

Unlike § 5, which applies only to a defined class of "covered" jurisdictions and incorporates a specific principle of nonretrogression, § 2 applies nationwide and requires a fact-intensive consideration of a "totality of circumstances." *Johnson v DeGrandy, supra.* Moreover, § 2 no longer applies only to "intentional discrimination." *Chisom v Roemer*, 501 U.S. 380, 395 (1991). Thus, under *Croson* and *Adarand*, § 2 -- or the possibility of a successful § 2 suit -- cannot give rise to a "compelling interest" in the enactment of race-based classifications. See Blumstein, *supra*, n. 40, at 586-87. The Court has recently made clear that the focus of § 2 is on "political opportunity." *De Grandy*, 114 S.Ct. at 2658. Section 2 is "not a guarantee of electoral success for minority-preferred candidates;" instead, "the ultimate right of § 2 is equality of opportunity." *Id.* at 2650, n. 11; see also *Whitcomb v Chavis*, 403 U.S. 124 (1973).[42] *Chisom v Roemer*, 501 U.S. 380, 396-97, has made clear that § 2 provides a unitary right and that it does not create a right to a particular outcome. Blumstein, *supra*, n. 40, at 574-75. Therefore, to accept compliance with § 2 as a

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v Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 589-92 (1995).

[41] Because they cannot satisfy the requirement of "geographic compactness," Appellees -- and the majority below -- create a new and amorphous concept of "functional compactness." This concept lacks the support of precedent, depends on racial stereotyping, and is an obvious evasion of the first *Gingles* condition.

[42] The holding in *DeGrandy* that "[f]ailure to maximize [majority-minority districts] cannot be the measure of § 2," *id.* at 2660, is consistent with the "equality of opportunity" focus of § 2.

"compelling interest" that justifies enactment of race-based legislation intended to guarantee the election of minority candidates would totally distort the purpose of § 2 and extend its scope far beyond what Congress authorized.[43]

IV. North Carolina's Racial Gerrymander Was Not "Narrowly Tailored"

The "strict scrutiny" test requires that the State not only have a "compelling interest" in using racial classifications but also "narrowly tailored" the remedy.[44] The legislative history gives no indication that the General Assembly considered "less intrusive means" than majority-black districts for obtaining compliance with the Voting Rights Act. For example, the legislative history gives no indication that the General Assembly ever considered what might be the effect of the law enacted in 1989 which dispensed with a second primary when a candidate had received over 40% of the vote in the first primary. See N.C.G.S. § 163-111. Likewise, apparently no consideration was given to whether "plurality-black districts" might suffice.[45] As a result of the perceived

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[43] Allowing compliance with § 2 to serve as a "compelling interest" to justify North Carolina's racial gerrymanders contradicts the specific proviso in § 2. Also, it creates the constitutional tension between the Fourteenth and Fifteenth Amendments that *Miller* sought to avoid. Blumstein, *supra* n. 40, at 587, n. 430.

[44] Thus in *Wygant* it was noted that "other, less-intrusive means of accomplishing similar purposes -- such as the adoption of hiring goals -- are available." 476 U.S. at 284-85.

[45] Moreover, from the outset the General Assembly did not consider to what extent African Americans might be elected to Congress if traditional districting principles -- such as geographical

inflexible "max-black" policy of the Civil Rights Division -- the policy which *Miller* later held to be illegal -- the General Assembly focused solely on creating majority-black districts and ignored all alternatives. In so doing, it inexcusably neglected the constitutional requirement of "narrow tailoring;" and therefore, the racial gerrymander must fail the "strict scrutiny" test.

In *Wygant* Justice O'Connor emphasized the need for "the most exact connection between justification and classification." 476 U.S. at 285. However, in North Carolina's redistricting plan, no "exact connection" was made between areas where violations of the Voting Rights Act had occurred and the census blocks that the computer placed in the First and Twelfth Districts. For example, Durham County -- where the Shaw Appellants reside -- has never been subject to § 5 preclearance and there is no evidence of any past[46] or present[47] violation of the rights of African Americans in Durham to participate in the

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compactness and community of interest -- were used; if incumbency protection were abandoned; if blacks and Native Americans were grouped in a "minority-white" district; if Congress were requested to amend 2 U.S.C. § 2c; or if racial data were removed from the computer program used in drawing the congressional districts.

[46] By 1960, 62% of Durham's eligible black population was registered to vote. Keech & Sistrom, *North Carolina*, in *Quiet Revolution in the South* 159 (C. Davidson & B. Grofman eds.) (Princeton University Press, 1994). In *Thornburg v Gingles*, *supra*, the Court reversed the lower court's decision that single-member districts must be used in electing state legislators from Durham County.

[47] Thus, as a result of the election on November 7, 1995, eight of the thirteen members of the Durham City Council are black, although a majority of Durham's voters are white. See Durham, North Carolina *Herald-Sun*, A1, November 8, 1995.

political process. Nonetheless, most of Durham's African Americans were placed in the Twelfth District.[48]

CONCLUSION

Shaw and *Miller* would be flouted if the Court upheld North Carolina's flagrant racial gerrymander -- a regression to "segregation" that was the direct offspring of the lawless "maximization policy" enforced by the Civil Rights Division. The judgment below should be set aside, and an order entered to require the swift elimination of North Carolina's race-based redistricting plan.

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[48] Since Winston-Salem and Charlotte are both in counties which were never subject to preclearance under § 5, the placement in the Twelfth District of African Americans residing in those cities also reveals the General Assembly's lack of any effort or intent to make an "exact connection" between the racially-drawn district boundaries and the State's alleged "compelling interest" in compliance with the Voting Rights Act. The same deficiency is demonstrated by the transfer of a substantial concentration of Winston-Salem blacks from the "urban" Twelfth District to the more "rural" Fifth District. Appellees have also defended the redistricting plan as "narrowly tailored" because it protected "incumbents." However, the protection of "white incumbents" is inconsistent with the "narrow tailoring" of a redistricting plan to allow greater opportunity for African Americans to be elected to Congress.